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ABSTRACT

The objective of the research reported in this speech was to investigate the extent to which alternatives to tenure will withstand legal scrutiny and the degree to which higher education, through the alternative configurations, and the courts, through legal interpretations, are modifying traditional tenure. Tenure principles of the profession are compared with legal principles identified in court cases involving nontenured faculty and with the alternative configurations. Eighty post-1972 court cases were utilized to explain the degree to which the courts have internalized 38 tenure principles identified from analysis and synthesis of professional literature and grouped under the general principle that "tenure is an earned status." Among the conclusions are that neither the alternative-to-tenure configurations nor the courts have altered the classical structure of tenure; the alternative-to-tenure configurations will withstand legal scrutiny; and a significant number of institutions are adopting alternatives to tenure which take a variety of configurations. (Author/MLF)

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TENURE, ALTERNATIVES-TO-TENURE, AND THE COURTS

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Paper Presented At The

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Tenure, Alternatives-to-Tenure, and the Courts

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Introduction

Tenure for faculty in higher education in the United States has been challenged on several fronts in the last decade and a half. Steady-state student enrollment has halted growth, limiting the academic market and deterring faculty mobility; dwindling faculty turnover threatens intellectual vitality; largely tenured-in faculty closes out new talent aspiring to enter the profession; and scarce resources prompt a demand to reduce faculty complement. Created by the AAUP and the Association of American Colleges, the Commission on Academic Tenure conducted a formal review of tenure and published its recommendations in 1973. Its determination in favor of tenure notwithstanding, the cry against tenure has persisted.

While the prophets of doom condemn tenure and the profession steadfastly extols its virtues, the operational aspects of the question rest within the institution. Faced with actualization of the problems, institutions are seeking to widen the range of employment possibilities. Looking for methods to halt the trend toward 80 percent or better tenured faculty, some institutions are adopting alternatives-to-tenure, e.g., one-year contracts or eight- to ten-year probationary periods. This situation poses important questions for higher education. How far can these variations go before the principles of the profession are compromised, before the essential values of tenure have been abbrogated, and before the protection of tenure has been irrevocably eroded? Increasingly the courts offer a forum

where the issues confronting higher education are evaluated according to judicial logic.

Purposes of the Research

This paper presents the process and results of a research project which is based on five assumptions: 1) tenure is a crucial concept and practice in American higher education; 2) alternatives-to-tenure are arising as a means to circumvent tenure; 3) such alternatives are a threat to traditional tenure; 4) the United States courts may provide protection for faculty against the alternatives-to-tenure; and 5) in the process the courts may also modify traditional tenure.

The purpose of the study is to investigate the extent to which the alternative-to-tenure configurations will withstand legal scrutiny and to analyze the implications of the findings for the academic profession. Higher education as a profession has the attributes of a private legal system with its own law--the principles of tenure--juxtaposed with the public legal system--the Constitution and legislative statute. The study evaluates the extent to which the public legal system has internalized the tenure principles of the private legal system.

An additional objective is to determine the extent to which the alternative configurations are threatening tenure in higher education. The study also enables conclusions relative to the impact of court action on traditional tenure. A final objective is to identify the degree to which institutions are adopting alternatives-to-tenure.

Methodology

The analytical framework of the study is a comparison of legal principles identified in court opinion with higher education practice in terms of the alternative-to-tenure configurations and with higher education's tenure

principles. This framework is developed from two perspectives. The first is the concept of higher education as a private legal system, as distinguished from a public legal system. A public legal system has its locus in the formal structures of the state such as the judiciary. A private legal system is based in a formal organization relatively independent of the state and has a jurisdiction which officially extends only to the organization's members. (8) Higher education is such a private legal system and its tenure policies, for purposes of this study, are its law.

The second perspective arises from the sequential legal reasoning usually employed by the courts in considering litigation by faculty, in the case of this study, nontenured faculty. The constitutional issues are both substantive and procedural. Substantive questions on issues of concern in this study arise through application of the First or Fourteenth Amendments and take priority in terms of judgment and relief. Procedural questions arise under the due process clause of the Fourteenth Amendment. The courts also look at the institution's tenure policy to ascertain whether the institution's "law" was followed. If there is no tenure policy, the courts look at established practice which is considered as binding as policy. Thus, consideration of the treatment by the courts of the private law of higher education must be approached from this framework of legal reasoning.

The design of the research is composed of three parts--the tenure principles of the profession, the alternative-to-tenure configurations currently utilized at institutions of higher education, and the legal principles identified by the courts in litigation involving nontenured faculty. The analysis includes three processes. First, the tenure principles are analyzed in terms of the post-1972 court cases and the legal principles to identify which tenure principles have been internalized by the courts. Second, the tenure

principles are applied to the alternative configurations to ascertain how the alternative-to-tenure configurations may be at odds with the tenure principles of the profession. Third, the alternative configurations are considered in light of the courts' reaction to the tenure principles which the alternatives violate; such application permits inference on the courts' possible reaction to the alternatives.

Court cases are the data, and cases utilized are those at the state and federal level concerning nontenured faculty. Specific data are items extracted from the court cases and are statements of interpretation and of law that are contained in the summary of legal conclusions at the beginning of a reported case and in the court opinion for the case. The importance of court cases as the data base lies in the fact that the courts set the boundaries of what actions are legal and therefore what actions are possible in higher education. In searching for guidelines for administrators, it is logical to analyze the source of the outer limits of allowable action.

The Study

The concept of tenure is based on a body of principles that have evolved over the years since the inception of the professionalization and of unification of academe by the disciplinary professional organizations and the AAUP at the beginning of the century. Slowly the tenure principles became actualized as institutional tenure policies and practices which are notable both for their uniformity and their uniqueness. Certain principles of tenure are basic and considered essential if higher education is to continue to fulfill its designated role in society. Any change in traditional tenure must be examined carefully in light of the fundamental principles in which tenure is embodied.

The alternative-to-tenure configurations which have emerged in the 1970's

are a potential threat to higher education. Careful scrutiny of their basic tenets and their deviation from the principles of tenure will reveal the extent of the danger. The present decade has also witnessed an awakening awareness by academicians of the possible impact of society's legal institutions on its education institutions. Long insulated from legal intrusion, higher education must now take account of legal principles which suddenly may challenge its own cherished traditions. Present then in the contemporary higher education scene are the three elements--tenure principles, legal principles, and the alternative-to-tenure configurations. The essence of each is the foundation for their interaction. Once the various pieces are in place, analysis of the impact of each part on each other part can proceed.

The Principles of Tenure

The principles of tenure which emerge from analysis and synthesis of professional literature are too numerous to include in this paper. Therefore, the six general principles will be noted along with the many subprinciples under principle number five, "tenure is an earned status." Tenure principle number five receives primary attention because it is the probationary period for nontenured faculty which is parallel to the situation in which faculty who have been hired under an alternative configuration find themselves. It should be noted that the concept of tenure is but one of many facets of the academic profession. Other facets of the profession may be equally significant to academe's identify; tenure has been isolated here for analysis.

The six general tenure principles with detailed breakdown under number five are:

1. Tenure secures the long-term development of knowledge. (plus five subprinciples)
2. Tenure ensures freedom of inquiry. (plus eight subprinciples)

3. Tenure provides cohesion for the academic profession. (plus five subprinciples)

4. Tenure enables the institution to fulfill its designated mission for the common good. (plus five subprinciples)

5. Tenure is an earned status.

   A. Probationary process

      1. Because the time period necessary to secure a doctorate enables careful development of the requisite skills for inquiry, an earned doctorate is often a prerequisite to employment and/or tenure.[1] (13, p. 14)

      2. The doctorate process--study, examination, original research, mentor contact--provides an internship for the profession. (13, p.14)

      3. Any faculty member appointed to a full-time teaching position should be a candidate for tenure. (1, p. 2)

      4. Part-time faculty are not expected to enter the tenure track. (17, p. 30)

      5. The probationary period should include service at all institutions of higher education at which the faculty member has served. (1, p. 2)

      6. The precise terms of appointment should be stated in writing. (1, p. 2)

   B. Probationary status

      1. The mere presence of tenure ensures minimal rights to nontenured faculty.

      2. Tenure ensures the right to free inquiry for nontenured faculty who are protected during their nontenured years when they have freedom to do research. (1, p. 2)

      3. Tenure ensures the right to free inquiry for nontenured faculty who are protected during their nontenured years when they have the freedom to publish the results of research. (1, p. 2)

      4. Tenure ensures the right to free inquiry for nontenured faculty who are protected during their nontenured years when they have the freedom in the classroom to discuss their subject. (1, p. 2)

      5. Tenure ensures the right to free inquiry for nontenured faculty who are protected during their nontenured years when they have freedom in extramural utterances and activities in areas of their expertise. (1, p. 2)

6. Nontenured faculty have a concurrent obligation for responsible utterances and actions.

7. The public pronouncements of nontenured faculty should be limited to areas of their expertise.

8. Recognized expertise of nontenured faculty is not license to action beyond the rights of private citizens.

9. The presence of minimal rights does not guarantee tenure.

C. The process of earning tenure

1. The conditions for admission to tenure are extensive and not frivolous. (10, pp. 10-14)

2. Probationary faculty must demonstrate their academic potential to their institutional peers. (10, pp. 10-14)

3. Probationary faculty must demonstrate their academic potential to administrators of the institution.

4. Probationary faculty must demonstrate adherence to standards of the institution and contribute to areas of its priorities.

5. Probationary faculty must demonstrate their academic potential to professional colleagues in their discipline through publication. (10, pp. 10-14)

D. Process of dismissal during probationary period

1. Dismissal of nontenured faculty during a term contract must be for cause. (1, p. 2)

2. Dismissal of nontenured faculty during a term contract must be preceded by due process. (1, p. 2)

3. Due process involves clear notice of the charges. (1, p. 2)

4. Due process involves a hearing held long enough after the statement of charges to allow reasonable time to marshall facts and evidence. (1, p. 2)

5. The hearing panel should consist of faculty members chosen on the basis of objectivity, competence, and regard with which they are held in the academic community. (20, p. 6)

6. At the hearing the faculty member must be allowed to be heard in his/her own defense. (20, p. 6)

7. At the hearing the faculty member must be allowed to confront witnesses against him/her. (20, p. 6)

8. At the hearing the faculty member must be allowed to have an adviser of his/her choosing. (20, p. 6)

9. At the hearing there should be a record of the proceedings which is available to all. (20, p. 6)

E. Process of nonrenewal

1. Nontenured faculty whose contracts are not being renewed should receive written notice of the reasons for nonrenewal. (15, p. 16)

2. Nontenured faculty whose contracts are not being renewed should receive timely notice of nonrenewal. (1, p. 2)

3. Nontenured faculty whose contracts are not being renewed should receive an opportunity to request reconsideration by the decision-making body. (15, p. 16)

4. Institutions must follow their policies and procedures in relation to nonrenewal.

F. Process of conferring tenure

1. The probationary period is a fixed period. (1, p. 2)

2. After expiration of a probationary period, faculty should have continuous employment. (1, p.2)

3. Determination of whether a nontenured faculty member has demonstrated adequate academic potential to institutional peers, administrators, and professional colleagues is through formal evaluation procedures.

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4. The decision to confer tenure/multifaceted involving peers, administrators, and the institutional governing board.

5. Conferral of tenure involves formal notice of acceptance.

6. Tenure ensures continuing employment. (plus fourteen subprinciples)

The Legal Principles

The legal principles which apply to nontenured faculty whose employment is not continued are identified from two Supreme Court cases, Board of Regents v. Roth (4) and Perry v. Sindermann (16) (both decided by the Court on June 29, 1972), from some additional court cases, and from the literature on litigation by nontenured faculty. The nine general applicable legal principles

are:

1. Whether a nontenured faculty member at a public institution has a right to continued employment is based on state law. (4, p. 577)

2. A nontenured faculty member may not be deprived of a property interest in his position without procedural due process. (4, p. 564)

3. A nontenured faculty member may not be deprived of a liberty interest in his position without procedural due process. (4, pp. 5 72-573)

4. Failure to renew a nontenured faculty member's employment based on the exercise of First Amendment rights is intrinsically unconstitutional. (16, pp. 597-598)

5. Exercise of First Amendment rights carried to such a point as clearly to overbalance the faculty member's usefulness as an instructor by violating the best interests of the institution is not protected. (9, p. 588)

6. Minus unconstitutional reasons, the court will not substitute its judgment for that of the institution in the nonrenewal decision. (11, p. 1270)

7. A nontenured faculty member has no constitutional right to public employment (16, p. 597), and therefore no right to a pretermination hearing (4, p. 569) nor right to the reasons for nonrenewal. (4, p. 569)

8. A nontenured faculty member deprived of a property or liberty interest in a position or deprived of a position based on impermissible constitutional reasons must be given procedural due process. (4, pp. 569-570)

9. Proof of property interest or liberty interest does not entitle a faculty member to reinstatement but only to due process. (16, p. 603)

Alternative-to-Tenure Configurations

Following a period of discussion and compromise in the 1930's, the AAUP 1940 Statement defining academic freedom and tenure was presented to the profession. During the next decade this classical tenure statement generated by leaders of the academic profession was accepted by their employers. Since 1940 the tenure statement, although supplemented by additional policy statements, has remained unchanged and has been incorporated into the tenure policy of the vast majority of institutions. Historically, however, the range of variation in tenure practices at American institutions has always

been wide. Academic tradition accepts that the specifics of a tenure policy are the prerogative of individual institutions. However, over the past 40 years the variations have usually been within the parameters established by the AAUP 1940 Statement. Now wider variations are arising and they are appearing at institutions generally regarded as of high quality.

Some form of job tenure beyond a contract is still viewed as necessary for the practice of a profession. Many, if not all, of the principle structural features of classical tenure continue to appear in the core of even variations in tenure. A probationary period of seven years, timely notice of the tenure decision, peer review, and a multifaceted tenure decision leading to job security and to protection of academic freedom are the primary mainstays of classical tenure.

A classification system for the alternative-to-tenure configurations establishes the institutional variations that are contemporary and measures them against the core of traditional tenure. Inherent in classical tenure also is the precept that tenure is a process; how tenure is attained is as significant as the fact of attainment. The third element in the taxonomy of alternative configurations is the institution's posture on tenure. In the contemporary setting the institution's statement on tenure is a key factor. When the separately developed principles of the academic profession finally encountered the legal principles in court in the 1970's,a new legal principle emerged. Minus an unconstitutional or illegal basis for nonrenewal, the institutional tenure policy is controlling. Thus, the classification system that arises from application of institutional alternative-to-tenure configurations to elements in the traditional process of granting tenure is depicted in Figure 1.

Not all of the variations in tenure listed in Figure 1 are currently

INSTITUTIONAL POSTURE

PROCESS	Traditional Tenure (AAUP)	Alternatives-to-Tenure		No Policy
		PREPROBATION Competition for tenure track Firm doctoral requirement	EXTRATENURE TRACK Limited appointment Limited renewal appointment Moratorium Part-time Multiyear contracts Unlimited renewal appointment	Employment contract
	PROBATION STAGE Seven years/fixed limit Protects academic freedom	PROBATION Shorten probationary period Lengthen probationary period Variable probationary period		
	REVIEW STAGE Peer review Administrative review Review by academic discipline	REVIEW Eliminate review Perfunctory review		
	ACCEPTANCE STAGE Multifaceted decision Timely notice Notice of reasons for nonrenewal	ACCEPTANCE Eliminate one or more levels in decision process Shorten notification period		
	TENURE OUTCOME STAGE Protects academic freedom Job security for life or until retirement	TENURE OUTCOME No tenure at conclusion of probationary process Limitation on duration of tenure		

Figure 1. Taxonomy of alternative-to-tenure configurations

utilized in institutions in American higher education. Modifications occur primarily in the Preprobationary, Probationary, and Tenure Outcome periods of the tenure process and initiation of an extratenure track. The variations are grouped under two headings, those variations that provide 1) mixed tenure system, and those that allow no tenure, 2) extratenure track.

1. Mixed Tenure System
    a. Competition for tenure track
    b. Extended probationary period
    c. Prefunctory review
    d. No tenure at conclusion of process
2. Extratenure Track
    a. Limited appointment
    b. Limited renewable appointment
    c. Moratorium
    d. Part-time
    e. Multiyear contracts
    f. Unlimited renewable appointment

Mixed Tenure System--Competition for tenure track. An alternative-to-tenure configuration which creates competition for a tenure track initially establishes a no-tenure track situation for faculty but with the possibility that at some time a tenure position might be secured.

Mixed Tenure System--Extended Probationary period. At the present time the primary method of altering the probationary period is to extend the length of time. Extending the probationary period is the technique utilized by several large research institutions to gain some flexibility in staffing. Extensions in effect range from nine years to 19 years.

Mixed Tenure System--Perfunctory review. The process of evaluating

nontenured faculty in a perfunctory manner has long been a practice in certain prestigious institutions. However, the practice has been increasing in recent years. Excellent faculty are hired by these institutions with the idea, usually not expressed to the faculty member, that they would not receive tenure. They are hired to teach undergraduate introductory courses with some upper level courses, proceed through the evaluation process, receive a generally favorable evaluation, and do not receive tenure. The institution's purpose is to avoid tenuring any but the most outstanding scholars, and for those faculty not given tenure, a six-year employment period at a prestigious institution is supposed to provide an easy ticket to a tenure track position at a lesser institution.

Mixed Tenure System--No tenure at conclusion of process. Two alternative configurations exist the essence of which is that faculty receive no appointment to continuous employment at the end of a probationary period. Faculty are continued at the institution following the termination of the probationary period but with no tenure. One example is a quota system combined with a limited renewable appointment. Under this system institutions award tenure but also maintain faculty who are not on a tenure track. Tenure is granted to some faculty and other faculty are continued on beyond the end of the probationary period without tenure. Therefore, while their colleagues are receiving tenure, faculty outside the quota receive a renewable term contract. Another method of continuing faculty beyond the probationary period is to shift their status. "Shifting status" involves changing faculty from one classification to another in order to avoid granting them tenure or releasing them from employment.

Extratenure track. The alternative-to-tenure configurations which fall within the "extratenure track" place designated faculty or positions in a

status which stipulates that they will never become tenured, nor even enter a probationary period. Faculty employed under one of the six configurations classified as extratenure are virtually outside the tenure process.

Extratenure Track--Limited appointment. The first category, limited appointments, involves faculty who have an appointment for a specified period of time, usually one year and possibly two, with no possibility that the appointment will be renewed. Such appointments have been a practice in higher education for years, utilized for leave replacements and visiting scholars, for example. Recently, however, the practice has increased and has been modified. Limited appointments are employed to hire faculty not as replacements nor as visiting scholars but to teach beginning level courses similar to any regular faculty member. (22, p. 268)

Extratenure Track--Limited renewable appointment. Limited appointments are made under provisions that allow temporary appointments on a renewable basis. Limited appointments occur when the institution does not wish to renew the appointment as allowed by policy and sets the termination date at the outset. Limited appointments appear to be less common than limited renewable appointments. This latter practice allows short-term appointments to be renewed a specified number of times. Another type of limited renewable appointment occurs under another variation of the quota system. According to this quota configuration, probation is eliminated for a segment of non-tenured faculty because of a quota system which stipulates that some positions never are tenured. A specified number of faculty are hired on contracts renewable a limited number of times.

Extratenure Track-Moratorium. This category includes only one institution which has declared a moratorium on tenure appointments for a period of seven years. In 1975 Muhlenberg College, Allentown, Pennsylvania, imposed a

moratorium because 72 percent of the faculty already were tenured. No department may hire in a tenure track unless the department in below 66 percent tenured. Currently no department is below that level. The ban on tenure is tentatively set for seven years with the goal of achieving a 66 percent tenure level by that time. (21)

Extratenure Track--Part-time. In addition to the modifications in traditional tenure approaches, tenure is avoided by appointing faculty to part-time positions.

Extratenure Track--Multiyear contracts. Because no faculty at the institution ever receive permanent employment, the multiyear contract systems have received primary attention in the professional literature as the most heinous alternative configuration. Here institutions opt to avoid tenure completely by continually evaluating faculty and offering successive term contracts of varying lengths depending on the institution. Institutions have developed different names for variations on this theme.

Extratenure Track--Unlimited renewable appointment. This final alternative-to-tenure category needs essentially no explanation. Faculty are merely continued on one-year renewable appointments indefinitely.

Within the nine alternative-to-tenure labels twelve alternative variations are in place at 19 institutions, the state-wide community college system of Virginia, and the University of Wisconsin. The University of Miami is considering a quota system (2 and 5), and other institutions are searching for other means to avoid near-100 percent tenure.

Analysis

The three processes which comprise the analysis were mentioned previously. First, the tenure principles are analyzed in terms of the post-1972 court cases and the legal principles to identify which tenure principles

have been internalized by the courts. Second, the tenure principles are applied to the alternative configurations to ascertain how the alternative-to-tenure configurations may be at odds with the tenure principles of the profession. Third, the alternative configurations are considered in light of the courts' reaction to the tenure principles which the alternatives violate; such application permits inference on the courts' possible reaction to the alternatives.

Thus, in analyzing the tenure principles in terms of the post-1972 court cases and the legal principles, 80 court cases were utilized to explain the degree to which the courts have internalized the 38 tenure principles under "Tenure is an earned status."

The results of consideration of the court cases and legal principles in relation to the tenure principles is summarized as follows: 1) the tenure principles which are well defined in academia and incorporated into law; 2) the tenure principles which are established in the academic community but are not accepted in law; 3) the tenure principles which are established in law but developing in the academic community; and 4) the tenure principles which are relatively open to opinion in both areas, that is, they are neither stipulated in the academic world nor defined by law.

Tenure principles defined in academia and in law: 1) the due process requirements; 2) the tenure principles which stipulate that a nontenured faculty member must prove his academic potential to his peers, institutional administrators, and professional colleagues in his discipline; 3) an earned doctorate may be a prerequisite to employment and/or tenure. In addition, two negative principles of the profession have received the courts' support: 4) part-time faculty are not expected to become candidates for tenure; and 5) tenure protects tenured faculty from internal institutional pressures for

conformity but not nontenured faculty who are being judged for fitness by the academic community.

Tenure principles defined in academia but not in law: 1) after expiration of a probationary period, faculty should have continuous employment; 2) tenure ensures the academic freedon of nontenured faculty during their probationary period; 3) the decision to confer tenure is multifaceted involving peers, administrators, and the institutional governing board (the courts have denied the necessity for faculty input into the tenure decision); 4) dismissal during a term contract may be only for cause; and 5) nonrenewed nontenured faculty should receive reasons for the nonrenewal and an opportunity for a hearing before the decision-making body.

Tenure principles defined in law but not in academia: 1) the principles of adequate redress for violation of rights; 2) faculty rights under academic freedom v. rights under the First Amendment; and 3) tenure rights of coaches.

Tenure principles defined neither in academia nor in law: 1) temporary faculty should have all the rights and benefits of regular faculty; and 2) principles defining faculty rights and responsibilities in terms of their expertise.

The second step in the process of analysis involves comparison of the tenure principles with alternative-to-tenure configurations. Having examined how the tenure principles of the profession have fared in court, consideration of the alternatives-to-tenure in relation to the tenure principles will provide a basis for the final analysis of the courts approach to the alternative schemes.

The findings on this segment of the analysis demonstrate that the alternative-to-tenure configurations in general violate three tenure principles: 1) any faculty member with a full-time teaching position should be a

candidate for tenure; 2) the probationary period is fixed; and 3) after the probationary period faculty should have continuous employment. In eliminating tenure, the alternatives usually preclude continuous employment. However, such a change in the traditional concept of tenure, while a monumental variation, does not mandate deviation from other elements of the concept. Although the tenure principles which are affected by the alternatives-to-tenure are significant principles, the main features of traditional tenure remain intact. Institutions have managed to severely modify and even abandon tenure while maintaining the preponderance of the traditional tenure concept.

The last step in the analytical process involves comparison of the alternative-to-tenure configurations with court decisions. Almost by definition alternatives to the conventional tenure system violate one or more tenure principle. Accordingly the final question is whether the principles violated have been upheld in previous court decisions and hence how the alternative systems might fare in court. If a tenure principle which is violated by an alternative configuration has been upheld in court, then that configuration would be expected to face difficulties should litigation arise.

Three tenure principles are listed above as the ones violated by one or more of the alternative configurations. None of those principles has been upheld by the courts. With one exception--a major exception but one concerning a peripheral issue and thus not noted here--it is impossible to identify any alternative configurations that are comparable to situations in the nontenure cases which have been declared illegal.

Findings

A summary of the findings includes five points: 1) The essential principles of tenure as understood in the academic world have not been upheld in

totality by the courts. 2) The courts have not substituted legal principles for the basic principles of the profession. 3) The courts uphold only those tenure principles which have foundation in constitutional amendments or in statutory law. 4) The alternative-to-tenure configurations now extant violate only three tenure principles: (a) full-time faculty should be candidates for tenure; (b) the probationary period should be fixed; and (c) after probation there should be continuous employment. 5) The tenure principles which are violated by the alternative configurations have not been upheld by the courts.

Conclusions

After examination of court cases involving litigation by nontenured faculty and applying the legal principles therein to the tenure principles and alternative-to-tenure configurations, the conclusion is beyond doubt that the courts provide only very minimal support for nontenured faculty whose employment is not renewed. Thus, neither do they provide any leverage against the configurations which are a potential threat to the entire tenure concept. However, despite the continual increase in the number of institutions adopting an alternative configuration and the courts' failure to support more than a minority of the tenure principles, the main features of tenure remain intact. Neither institutions of higher education through the alternative configurations nor the courts have altered the basic structure of tenure, and traditional tenure currently remains firmly in place.

On the one hand institutions which have sought an alternative to tenure have in general located a modification which would provide some flexibility without radically deviating from the basic principles of tenure. By in large institutions have extablished a tenure track and a nontenure track, thus retaining tenure for most faculty, or have eliminated tenure for all only

until such time as the equilibrium returns to the professional staffing configuration at the institution. With a tenure policy in place often extreme modifications in tenure by the corporate body would be impossible or very difficult to achieve, and a separate nontenure track might be the only alternative. At any rate for whatever reasons, the alternative configurations violate only three of the tenure principles, and the general structure of tenure is being observed.

On the second hand the courts have chosen to intrude only into the outline features of tenure, most of them procedural questions, and have declined to rule on primary substantive questions. Given the courts' laissez faire attitude toward higher education, their interference occurs only to ensure procedural safeguards or to protect basic personal freedoms. Although the courts have not internalized the tenure principles, neither have they interposed legal interpretation to the detriment of the tenure concept, and traditional tenure seems fairly well insulated from erosion by court decree. An exception is the recent ruling by the Pennsylvania district court awarding tenure to a nontenured faculty member. (12) This decision has been appealed.

Another conclusion apparent from the data is that the AAUP has made little impression and has had slight impact on the courts. Although the courts have upheld some of the tenure principles, the majority of the principles remain firm only within the profession. Furthermore, the tenure principles which are upheld by the courts are those which have a basis in statute or constitutional law. It seems pure coincidence that in following statutory and constitutional law the courts also adhere to some of the tenure principles.

Perhaps a study of the influence of the AAUP upon state legislation would reveal AAUP responsibility for the statutes that the courts have been

enforcing. Although much impact there seems doubtful, if present, it might demonstrate an indirect influence by the AAUP on court decisions. Minus evidence of indirect impact, at present there seems little to support the AAUP as a powerful force pressuring court opinion on behalf of the sacred principles of the profession. Although the Association has filed amicus briefs in several of the court cases utilized here as a data base, in no case opinions did the court mention the AAUP or its role as spokes-organization and guardian of the profession.

At the majority of American institutions of higher education tenure is firmly entrenched. In addition only a very few institutions have deviated from tenure to the extreme of eliminating it for all faculty. Interestingly such institutions may actually preserve the traditional tenure system to a greater extent than the institutions which modify tenure only slightly. As of 1975 Hampshire College reports that 1.8 persons per year were not reappointed under Hampshire's multicontract system as opposed to 5.5 persons for a tenure-granting institution of comparable size. (3, p. 6) Hence, Hampshire, at least to 1975, was retaining more faculty under a no-tenure system than are institutions which grant tenure. In a study conducted as a follow-up to that completed for the Keast Commission Report (6), two-thirds of the institutions with tenure systems reported that they had renewed 80 percent or more of their term contracts expiring during the 1973-1974 academic year. Of the institutions operating under term-contract systems in 1973-1974, almost all (93 percent) had reappointed 90 percent or more of their faculty. (7, p. 1) The quota system, a moratorium on tenure, and even the extended probationary period would seem to create far more uncertainty than the Hampshire College system and other multicontract colleges.

However, although the multiyear contract systems appear to result in

a higher reappointment rate for faculty than under traditional tenure policies, other serious detrimental consequences of the multiyear contract system have been identified. A faculty committee examining the contract system at Hampshire College found a number of fundamental problems. The most striking defect is that the system has the overall impact of lowering the quality of the faculty. Because they set high standards of measurement for all, exceptional faculty are considered a threat to the other faculty. In addition, since every faculty member's turn to be evaluated comes around, the system discourages negative judgments for fear of retaliation. Continuous evaluation has the adverse effect of diverting faculty time and energy from other developmental pursuits to the task of evaluating peers. The expected encouragement of faculty development has not occurred, and a sense of paranoia among faculty has had a demoralizing effect. Despite these problems the faculty committee recommended continuation of the multiyear contract system. Continued examination of the system is going on, and Hampshire's president suggests that modifications in the system to correct its defects are perhaps less desireable than the option of a more traditional tenure system. (14)

The fact that institutions are still turning to alternative-to-tenure configurations to alleviate staffing problems indicates that the profession has failed to come to grips with the situation facing higher education in terms of too high a percentage of tenured faculty and a closed market for doctoral recipients desiring to enter the profession. Indeed the profession has hardly addressed the problem. Individual institutions are seeking solutions, and the results are the alternative configurations and studies on other alternatives such as the two to be mentioned shortly. As staffing problems accelerate, the potential for greater upheaval for nontenured faculty increases, and the courts' posture toward tenure becomes more significant.

Implications

The public legal system of the national and state judiciary and the private legal system within higher education clash more than they mesh. Some of the tenure principles which have a clear foundation in statute or the constitution have been accepted by the courts. However, the majority of the tenure principles remain an integral part of only the private legal system. Significantly, as mentioned above, while the courts have not accepted the principles of the profession, neither have they substituted their own. Consequently, from the legal point of view tenure remains intact. In fact, while the alternative configurations modify the basic structure of tenure very little, the courts are altering tenure far less than the academic profession.

Currently the private legal system is showing signs of crumbling. The tenure principles which have been the foundation of academic freedom and the profession are being chipped away by the alternative configurations. In addition, the profession may not be strong enough to stop the disintegration and to repair the foundation.

Those academic ideals which are personified in the tenure principles have over the years suffered from a lack of enforcement power on the part of their private legal system. Committee A of the AAUP has been the attempt at enforcement. Due to limited success of persuasion and censure, aggrieved faculty have appealed to the public legal system. With the failure of the courts to provide the desired protection, the profession is back where it started; the profession remains as the only source of assistance for faculty.

It is doubtful that the AAUP with its reduced power base can accomplish now what it could not in earlier years. Indeed there is a threat to the profession far broader than the effects of the alternative configurations on

individual faculty and on the profession. The courts failure to uphold and internalize the principles of tenure underscores the AAUP's loss of pre-eminence as protector of the profession. The result is that the profession currently is unguarded.

The effect of the absence of a recognized authority to speak for the profession is already evident. When Hampshire College was considering its policy of multiyear contracts and no tenure, the founders consulted with the AAUP. (3) It is clear that institutions currently are not consulting with the Association prior to implementation of an alternative-to-tenure system.

Without answers provided by the profession, solutions will be generated piecemeal. The roots of a definition of tenure have resided in the profession at large through the AAUP. Because the AAUP has no longer been the paramount spokes-organization, institutions are defining tenure for themselves through the alternative-to-tenure configurations. In addition, individual institutions are seeking other solutions to overstaffing which do not change traditional tenure but may have other implications for the profession. Two major American universities recently compiled reports (18 and 19) exploring employment options including early retirement, partial retirement plans, job-sharing, wider use of visiting chairs and consulting, and cooperative staffing with nearby institutions or even a national pool of faculty. Such practices if adopted piecemeal without careful evaluation for long-term effects may be deleterious to the profession. When institutions function under the profession's tenure policy, then faculty have the support of the profession as interpreter of the policy in cases where action against a faculty member violated the policy. If the policy is the institution's, the profession has no input and the individual has no source for support.

Another direction of piecemeal action may be an increase in faculty

unionization. While a decline in collective bargaining has been in evidence in recent years, this could change. In the past faculty had held an elite position in the employment hierarchy. Higher education has always grown and positions were plentiful. Faculty are now subject to the same vicissitudes of the marketplace as other employees, and a union may seem the only protection. If the corporation as employers undertakes to define tenure and to establish alternative-to-tenure configurations, the response may have to be at the institutional level. If the profession as a whole cannot provide the solution, then unification of faculty at individual institutions may appear the only recourse.

Another implication that may be drawn from the research is that should the profession agree to become more political, legislative lobbying for laws which protect faculty is an obvious future direction. Given the fact that state law is controlling in litigation and that the courts first look to state law in determining the rights of nontenured faculty, the implication is clear that, unless the courts change direction, the only route outside of the profession to greater protection for nontenured faculty is through legislation. State laws vary with some states requiring reasons for nonrenewal and even a hearing. Minus a more flexible interpretation of the property right by the courts, the profession should consider a concerted effort to bring about, in all states, legislation which reflects the traditional principles of the profession.

Should the profession in fact prove powerless to turn the tide against the forces which indict tenure and anticipate its demise, there is still the liklihood that the Supreme Court will change its approach. That court diection is continually evolving is without question. It also should be clear that the nature of the academic profession is unique and with additional and more lucid explanations of what constitutes the profession by its

spokes-persons, the cause of traditional tenure in court may prevail. Weisberger notes that the Supreme Court identifies a "common law of the shop," which is the many and varied practices of the industry and shop which have been incorporated into the collective bargaining agreement unless a "contrary intent" was expressed. Contract arbitrators are expected to consider this "common law" in judging grievances. Thus, continues Weisberger in applying the concept to higher education, in the absence of the "contrary intent," academic custom, usage, and practice become an integral part of higher education faculty collective bargaining agreements and grievance proceedings. The "common law of academe" necessarily contributes to the concept of special arbitral treatment of academic status decisions and assures its continuation in many educators' collective bargaining relationships. (23, pp. 11-12) This idea may be expanded to apply to a more general comprehension by the courts of a "common law of academe" which indicates that a unique legal approach is required for a unique environment.

A joint effort by the profession in consort with the legal system is more desirable than reliance solely upon the courts. The profession's historic reticence to create conditions which would encourage intrusions of the public law into the law of academe is not necessarily ill-founded. While the support of the legal system for the rights of faculty is crucial, the professional principles beyond the legal requirements are of paramount significance as the foundation of the profession. Success on the part of the profession in its enforcement attempts would have been ideal. However, since at this point the question is whether the profession has retained any power, rejuvenation of professional identity is vital. In addition to the fact that reliance on the courts for protection will prove inadequate, the profession must remain strong for its own sake.

Footnote

[1]Tenure principles which do not have a specific source cited were developed from wide reading on tenure and were not mentioned specifically in the present form by any one author.

Bibliography

1. Academic freedom and tenure, 1940 Statement of Principles and interpretive comments. Policy Documents and Reports. Washington, D.C.: American Association of University Professors, 1973.

2. Besvinick, S.L. Personal communication, November 15, 1978.

3. Birney, R.C. Employment by Faculty Contract: Progress Report No. 1. Amherst, Mass.: Hampshire College, 1975.

4. Board of Regents v. Roth 310 F. Supp. 970 (1970); 446 F. 2d 809 (1971); 408 U.S. 564 (1972).

5. Chait, R. Alternatives to and Within Traditional Tenure Practices. Unpublished manuscript, 1977.

6. Commission on Academic Tenure. Academic Tenure. San Fran cisco: Jossey-Bass, 1973.

7. El-Khawas, E.H., and Furniss, W.T. Faculty Tenure and Contract Systems: 1972 and 1974. Washington, D.C.: American Council on Education, December, 1974. (Eric Document Reproduction Service No. ED 100 197)

8. Evan, W.M. Public and Private Legal Systems. Organizational Theory: Structures, Systems, and Environments. New York: John Wiley and Sons, 1976.

9. Ferguson v. Thomas 430 F. Supp. 1029 (1973)

10. Hagstrom, W.O. The Scientific Community. New York: Basic Books, 1965.

11. Keddie v. The Pennsylvania State University 412 F. Supp. 1264 (1976)

12. Kunda v. Muhlenberg College, Civil Action No. 77-1955, October 20, 1978 (E. Dis. Pa.).

13. Light, D., Jr. Introduction: The Structure of the Academic Professions. Sociology of Education. 1975, 48. 2-28.

14. Longsworth, C.R. Designing New Personnel Policies: An Alternative to Tenure. CUPA Journal. Spring, 1977, 28, 22-27.

15. 1972 Recommended Institutional Regulations on Academic Freedom and Tenure. Policy Documents and Reports. Washington, D.C.: American Association of University Professors, 1973.

16. Perry v. Sindermann 430 F. 2d 939 (1970); 408 U.S. 593 (1972).

17. Report of the Special Committee on Academic Personnel Ineligible for Tenure. Policy Documents and Reports. Washington, D.C.: American Association of University Professors, 1973.

18. Report of the Task Committee on Faculty Resources. Unpublished manuscript, Temple University, November 20, 1978.

19. Stanford University News Service. News Release: Until recently the best known couples in America . . . Cal., May 24, 1977.

20. Statement on Procedural Standards in Faculty Dismissal Proceedings. Policy Documents and Reports. Washington, D.C.: American Association of University Professors, 1973.

21. Stenger, H. Personal communication, April 4, 1979.

22. Thomson, J., and Sandalow, T. On Full-time Non-tenure-track Appointments. American Association of University Professors Bulletin. September, 1978, 64, 267-273.

23. Wesiberger, J.M. Grievance Arbitration in Higher Education: Recent Experiences with Arbitration of Faculty Status Disputes (ACBIS monograph No. 6). Washington, D.C.: Academic Collective Bargaining Information Service, 1978.